RECENT CASES

AGENCY.

Liability of Agent without Authority

A, a physician, contracted with B, superintendent of the X corporation, to attend an employe. B had no authority to employ A. Neither B nor the corporation was held liable on the contract. *Sourwine* v. *McRoy Clay Works,* 85 N. W. (Ind.) 782.

For a further discussion, see Note, p. 240 of this issue.

CONSTITUTIONAL LAW.

Railroad Commission Fixing of Rates

The Supreme Court of the United States, reversing the decision of the Circuit Court, held that the fixing of railroad rates is a legislative act, and the validity thereof must be passed on by the highest court of the state before being taken to the United States Court. The Virginia Passenger Rate Cases (not yet published).

For a further discussion of the opinion of the Court see Note, p. 236 of this issue.

CONTRACTS.

Proof of Intent

Suit on a promissory note. The note was given in payment for certain patent rights of the plaintiff. The defendant was allowed to testify that he had an unlawful object in entering into the contract. The jury found that both parties intended to start a "bubble" scheme, to consist of selling, in reality not patent rights, but only territorial rights. The plaintiff appealed, assigning as error, *inter alia,* the admission of defendant's testimony as to his intent in forming the contract. The Supreme Court of Wisconsin held that the aim of the contract was clearly contrary to public policy, and that since the contract was proved, the plaintiff could not recover on the note. *Twentieth Century Co.* v. *Quilling,* 117 N. W. 1007. As to the question of the admission of

CONTRACTS (Continued).

the defendant's evidence, however, the opinion is not explicit. It was held that to admit it in this case could, at the most, have been nothing more than harmless error, "because it was in perfect harmony with the words of the contract as defendant claims it was made." This reasoning can only be supported on the supposition that the general purpose of both parties to enter into a contract contrary to public policy, was manifest from other testimony not reported. A few lines below, however, the Court says, apparently referring to contracts, "When the act in question is ambiguous as regards the intent, direct evidence is always proper." If this does in fact refer to contracts, it sets forth a most unusual proposition, and sanctions the varying of a written agreement by evidence of the undisclosed intention of either party.

CONVERSION.

Transfer of Bonds Wrongfully Pledged as Collateral

Negotiable bonds, secured by a mortgage, were issued by the Medina Gaslight Company. The secretary of the company pledged these bonds with the defendant, as collateral for a private debt of his own. Defendant received the bonds knowing that they were wrongfully pledged and fully cognizant of the fact that they were only for corporate use, and could only be negotiated by the president of the company. The defendant later delivered the bonds to another bank upon that bank's paying them the amount of the debt for which they were held as collateral. *Held,* when the defendant assumed to transfer the bonds to the German American Bank, it committed an act which was in hostility to the right and title of the plaintiff. This was a distinct and unequivocal conversion. *MacDonnell* v. *Buffalo Loan & Safe Deposit Co.,* 85 N. E. (N. Y.) 801.

All of the Court were of opinion that there had been a conversion, but Haight and Bartlett, JJ., dissented on the ground that the conversion had taken place when the bonds were originally pledged, in which case the action was barred by the statute of limitations. The authorities are uniform that where goods have been wrongfully sold and bought, both buyer and seller are liable for conversion, if the buyer was cognizant of the seller's wrong. (Am. & Eng. Ency. Vol. XXVIII, p. 685). But the dissenting opinion applied this rule likewise to the case where the relation was one of pledgor and pledgee instead of buyer and seller, and several cases

CONVERSION (Continued).

were cited in support of the proposition. Not one of these cases, however, stands for the doctrine advanced, namely that the conversion should date from the reception of the bonds by the defendant. The view of the majority of the Court that there was no conversion by the defendant until the disposition of the bonds by it, in the absence of any demand and refusal previously, would seem in accord with reason and authority. It was also contended in the dissent that since the taking from the defendant was by judicial process (an attachment) there could be no conversion. (*Van Hesse* v. *Mackay,* 55 Hun. 365). But since the execution was against the secretary, and the defendant knew that the bonds were not his property, he was guilty of conversion in delivering the property upon payment of the debt for which they were pledged.

CRIMINAL LAW.

What Constitutes an Assault

A charge that if defendant without justification shot a pistol in the direction of the prosecutor, within carrying distance of the pistol, not intending to hit him, but intending to scare him, he would be guilty of an assault, was held correct in *Edwards* v. *State,* 62 S. E. 565.

For a further discussion, see Note, p. 249 of this issue.

EQUITY.

Equity Pleading: Responsive Answer

Complainant asked for an injunction to restrain defendant from engaging in a business which he had agreed in writing not to engage in for a stated period. Defendant averred in his answer that the written agreement had been rescinded and an oral one substituted in which there was no reference to the restriction on trade. *Held,* no witness was called by complainant to overcome the answer. Bill dismissed. *Thomas* v. *Borden, 222* Pa. 184.

This case follows the well settled rule of equity, that an answer responsive to a bill can be overcome only by the testimony of two witnesses, or of one witness corroborated by circumstances elsewhere in evidence. *Eaton's Appeal,* 66 Pa. 483. This rule was borrowed from the Civil Law and first appeared in Chancery shortly after the middle of the Seventeenth

EQUITY (Continued).

century. *Wakelin* v. *Walthal,* 2 Ch. Ca. 8. At that time no explanation of the rule was given, but in modern times it has been explained as follows: The plaintiff calls upon the defendant to answer the allegations he makes and thereby admits the answer to be evidence. If it is testimony it is equal to that of any other witness. Therefore, if it is disproved by only one witness for the plaintiff, he cannot prevail, as the balance of proof is not in his favor. He must have another witness or else additional corroborative circumstances elsewhere in evidence, in order to succeed. *Clark* v. *Van Riemsdyk,* 9 Cranch. 153. For a criticism of the rule see, "Responsive Answer in Equity Considered as Evidence." J. M. Gest, Pa. Bar Assoc. 1904.

Cancellation of Deeds: Necessity for Return of Consideration

In an action to cancel a deed because of plaintiff grantor's incapacity, it appeared that the deed conveyed practically all her property, that she was adjudged incompetent ten days after making the deed; that she was 70 years old, and for some time prior thereto had been suffering mental and physical decline. *Held,* that under such circumstancces, plaintiff need not show, in suing to avoid the deed on account of grantee's fraud, that the deed was made without consideration or for an inadequate consideration, though, had she relied solely on want of consideration, she must have shown that fact, or, had she relied upon constructive fraud, she must have shown what the consideration was, and an offer to return it. *Schinder* v. *Pazoo,* 97 Pac. Rep. 755.

There is nothing new in this case. While the usual rule in suing to cancel a deed on the ground of fraud is that the grantor should place or offer to place the grantee in *statu quo* (Pomeroy's Eq., pages 910, 953), this obligation has been limited to those who are mentally responsible (*Crossen* v. *Murphy,* 31 Ore. 114); those who were not mentally responsible at the making of the contract are under no such obligation. *Crossen* v. *Murphy,* 31 Ore. 114; *Gibson* v. *Soper,* 6 Gray [Mass.] 279.

The reason given for this exception is the broad one of public policy. One who deals with a lunatic does so at his peril. To quote from Mr. Justice Thomas (*Gibson* v. *Soper,* 6 Gray 279): "To say that an insane man before he can avoid a voidable deed must put the grantee in *statu quo* would be to say, in effect, that in a large majority of cases his deed shall not be avoided at all. The more insane the grantor was when

EQUITY (Continued).

the deed was made, the less likely will he be to retain the fruits of his bargain so as to be able to make restitution. If he was so far demented as not to know or recollect what the bargain was, the difficulty will be still greater."

Both cases and text-books are very meagre on this subject. The case quoted above seems to intimate that no consideration need be returned in *any* case of insanity; but a better rule is laid down in a later case which, on quoting the rule, limits it to cases where fraud is practiced on one who is known at the time to be insane, but not when the purchase and conveyance are made in good faith for a good consideration, and without knowledge of insanity. *Eaton* v. *Eaton,* 37 N. J. L. 108.

Since the facts in the present case show clearly a knowledge of the insanity on the part of the grantee, and consequently a preconceived intention to defraud, there could be no doubt as to the justice of the case. A more interesting situation would have arisen if the grantee had been ignorant of the fact, and the grantor had squandered the consideration.

EVIDENCE.

Weight to be Given to Testimony of Handwriting Experts

An order dismissing a petition for an issue, *devisavit vel non,* was appealed from. The only testimony of appellant was the opinion of two handwriting experts to the effect that decedent had not signed the will. As against this there was the testimony of decedent's wife, appellee, that he had executed and delivered the will to her, corroborated by that of the widow of her brother-in-law, to whom she had given it, and by that of one, Minnie Wyatt, to the same effect. There was also the testimony of thirteen witnesses, who had known decedent for years, that the signature to the will was genuine. *Held,* (quoting from Greenleaf, Evid. 15th Ed., Sec. 580, note), "Upon this kind of evidence (that of handwriting experts) learned judges are of the opinion that very little if any reliance ought to be placed." *Fuller's Estate,* 70 Atl. 1005.

This case directly raised the question of the weight to be given to the testimony of handwriting experts. This question is not often raised, but whenever it has been considered, the courts have, as in the principal case, declared such testimony to be the lowest order of evidence. The reason for this rule though not often given would seem to be that such testimony is mere opinion evidence, based on the most uncertain and in-

EVIDENCE (Continued).

conclusive indications, and scarcely more certain to be reliable than the opinions of the jurymen themselves. It was therefore right in the principal case to disregard such evidence entirely in the presence of such an overwhelming amount of direct proof.

Evidence of Oral Promise As Part Consideration For Written Agreement

The plaintiff, and other residents of Kellogg, signed an agreement to subscribe to $10,000 worth of stock in the defendant company. The plantiff brings action to restrain the defendant from changing its principal place of business from Kellogg, and introduces an oral agreement, entered into by the defendant as an inducement to subscribe to its stock, that its principal plant should be located at Kellogg for not less than five years.

Held,—"The testimony tending to show the parol agreement to locate the factory at Kellogg for a term of not less than five years was competent. The written contract was silent on the subject and the testimony in question did not vary its terms." *Bolzin* v. *Gould Balance Valve Co.,* 118 N. W. 40.

This case follows the broad rule laid down in *Sutton* v. *Weber* (127 Iowa 361 1904), that "parol evidence is admissible . . . whenever there is a collateral oral contract, or it appear that the real contract between the parties is part in writing and part in parol." While it is uncertain how the Court intended such indefinite language should be construed it would seem, that these cases go the length of holding that the incompleteness of the written contract may be made to appear "by going outside of the writing and proving that there was a stipulation entered into, but not contained in it, and hence that only part of the written contract was put in writing;" and as was pointed out by Mitchell, J., in *Wheaton, etc. Co.* v. *Noye Mfg. Co.* (66 Minn. 156, 1896), "if any such doctrine is to obtain there would be very little left of the rule against varying written contracts by parol."

The written contract in our principal case was bilateral and therefore the admission of the evidence offered seems to conflict with the rule laid down by Mr. Wigmore (Evidence, Sec. 2433), that where the contract consists of mutual promises "the writing alone can be examined." The case of *Galvin* v. *Boston Elevated Ry. Co.* (180 Mass. 587, 1902), where a parol promise of employment was allowed to be proved as part consideration for a release reciting a money consideration, seems at first sight nearly parallel, but may be distinguished on the

EVIDENCE (Continued).

ground that the release was executed, and the contract therefore was not bilateral.

It would seem that the only ground on which the decision can be defended is that the Court, following the rule adopted by the best authorities, and construing the written contract "according to its subject-matter and the circumstances under which, and the purposes for which, it was executed," concluded that it was incomplete and that therefore parol evidence to prove a supplementary term upon which the writing was silent was admissible. (*Wheaton etc. Co.* v. *Noye Mfg. Co.,* 66 Minn. 156, 1896; Wigmore Evidence, Sec. 243.) The evidence, however, does not seem to warrant the Court's conclusion.

FELLOW-SERVANTS.

Superintendent Operating Car

Where the superintendent of an electric railway company takes out a new car, which has never been used in the service of the company, and acts as motorman during the test, which is on the line of the company, he is not a fellow-servant of a motorman, operating a car in the company's service, who is injured by the negligence of the superintendent in operating the car under test. *Latsha* v. *Shamokin and Edgewood Electric Ry. Co., 222* Pa. 201 (1908).

A master owes a duty to his servants to furnish reasonably safe appliances for them to use in his business. He cannot relieve himself of this duty except by performance. (*Ross* v. *Walker,* 139 Pa. 42, 1890.)

Therefore, it follows that the master is liable if he delegates to servants his duty to inspect railroad cars before receiving them on his line and the servants to whom he has delegated this duty are negligent in its performance, whereby an employe on said cars is injured. [*Union Stockyards* v. *Goodwin,* 57 Neb. 138 (1898).]

It has been held in Pennsylvania that a brakeman and a car inspector are fellow-servants in the same circle of employment. [*P. & R. R. R. Co.* v. *Hughes,* 119 Pa. 301 (1888); *contra, Union Pacific Ry. Co.* v. *Daniels,* 152 U. S. 684 (1894).]

But where a servant was employed by the master to construct or repair machinery to be used in the master's business he is responsible to his servants who use the machinery for any negligence in the work of construction or repairing. [*Pa. & N. Y. Canal & R. R. Co.* v. *Mason,* 109 Pa. 296 (1885).]

It is said that where the negligence relates to anything which

FELLOW-SERVANTS (Continued).

it was the master's duty to do, the master is liable. [*Ross* v. *Walker, supra.*]

If that is the test then the present case is correctly decided for here the servant (the superintendent) did not neglect to provide safe appliances for the master's business, but was negligent in the performance of an act relating to the testing of the car. It is the duty of the master to test cars before placing them in the hands of its servants for use in its business. *Union Stockyards* v. *Goodwin, supra.*

INJUNCTIONS.

Unfair Trade Competition

A brought a bill to restrain B from selling automobile seach-lights enclosed in a shell imitative of A's unpatented shell. The Court granted the injunction, although B's shell had his name prominently appearing upon it, and although B had never represented that his lamps were made by A. *Rushmore* v. *Mannhattan Screw and Stamping Works,* 163 Fed. 939.

For a full discussion, see Note, p. 246 of this issue.

JUDGMENTS.

Effect of an Overruling

In *Nason* v. *Nelson,* 62 S. E. 625, a case in which the mercantile interests of the state were largely involved, the Supreme Court of North Carolina directly overruled the earlier case of *Finch* v. *Gregg,* 126 N. C. 176. The general doctrine governing the effect of such overruling was clearly recognized, *i. e.,* that the Court declares not that the prior decision was bad law, but that it never was law at all. From this it follows that the later decision is, in a sense, retroactive, for if this doctrine be carried to its logical conclusion, it seems that even property rights acquired on the faith of the earlier decision, must be deemed no rights at all in the light of the later one. There are, however, exceptions to this strictly logical conclusion, which are worthy of note. (1) A party who has entered into a contract in reliance upon the judicial interpretation of a statute may not be prejudiced by a subsequent change of interpretation. In this case the codified law, as explained by the courts, is taken to be not merely evidence of what the law is—as are other judicial decisions—but a statement of what the law in fact is. (2) In

JUDGMENTS (Continued).

North Carolina—*Hill* v. *Brown,* 144 N. C. 117—property rights have been similarly protected when acquired, not in reliance upon the interpretation of a statute, but simply in reliance on the Court's statement of the common law. (3) A curious exception to the general rule occurred in the case of *Hood* v. *Society for Protection,* 221 Pa. 474. After decisions of the Supreme Court of Pennsylvania to the effect that certain words created a vested remainder, the testator used those words in his will. After his death, but before the will came into dispute, the Supreme Court decided that this particular set of words did not create a vested remainder. Having thus established a new rule for finding out the intention of testators, the Court decided to follow the old rule when this particular will came before them. It was held that since the object in construing wills was to discover the testator's intention, such intention could best be read in the light of those rules of law which governed the construction of intention at the time the will was made. This decision must be justified by assuming the testator to have had knowledge of the decisions of the Court as to the matter in question.

LIBEL.

The Supreme Court of Errors of Connecticut, in the case of *Barry* v. *McCollum,* 70 Atlantic, 1035, follows the English rule with regard to libel and holds that, where there were grounds for the belief on the part of defendant that the accusations made were true, and he published them honestly and in good faith, it is not an actionable libel.

What is a Privileged Occasion?

For a full discussion of the principles involved see Note, p. 243 of this issue.

NEGOTIABLE INSTRUMENTS.

Defendants were respectively president and secretary of a corporation, and also directors and large stockholders. The corporation had no assets whatever excepting certain patents, upon which it could not realize and the consideration for the contracts which were being executed by defendants and another director—those three constituting the active directors and conducting the business of the company. These contracts the defendants regarded as valuable. For the purpose of continuing the

Presentment For Payment and Notice of Dishonor

NEGOTIABLE INSTRUMENTS (Continued).

performance of these contracts they borrowed money from Luckenbach giving a note which they signed on behalf of the corporation without authority of the board of directors and also with said other director endorsed individually. When the note matured the company had no money with which to pay it as its executive officers knew. The note was not presented for payment, nor was formal notice of its dishonor given to any of the endorsers.

Under the Negotiable Instrument Act, May 16, 1901 (P. L. 206), Section 80 of which provides that, "presentment for payment is not required in order to charge an endorser where the instrument was made or accepted for his accomodation, and he had no reason to expect that the instrument will be paid if presented;" and section 115 which provides that, "notice of dishonor is not required to be given to an endorser in either of the following cases * * * (2) where the endorser is the person to whom the instrument is presented for payment; (3) where the instrument was made or accepted for his accommodation;" it was held that the holder of the note was not required to present it to the defendants for payment by the company, nor to give them an unnecessary notice of its dishonor, in order to hold them as endorsers. *Luckenbach* v. *McDonald,* 164 Fed. 296 (1908).

In order to charge the endorser of a promissory note without presentment to the maker two things are necessary: (1) that the instrument was made or accepted for his accommodation and (2) that the endorser had no reason to expect that the instrument will be paid if presented. From the reported facts it is not clear that this case comes under section 80. The maker of the note was engaged in the completion of contracts which its active directors thought to be valuable. Being in need of funds to complete the contract, it gave its note to Luckenbach to secure the payment of money borrowed for that purpose. The money so obtained was paid into the treasury of the maker. Defendants completed the work as directors of the maker by means of said money thus obtained. Whatever interest the defendants had in the completion of contracts by the company seems to have been as stockholders of the maker. It does not appear that Luckenbach knew that the directors of the company had not authorized the giving of its note, nor does it appear that he dealt with the company other than as the maker. The company having received the benefits of the act of the directors in giving its note must be considered to have adopted their act as its own and the note as its own note. These facts

NEGOTIABLE INSTRUMENTS (Continued).

do not appear inconsistent with the view that the company borrowed the money for its own use and not for the accommodation of the defendants.

It is not clear from the reported facts that the defendants had at the time of their endorsing the note no reason to expect that it would be paid if presented. The facts show neither the amount of the consideration, nor what proportion, if any, would be due or payable to the company at the maturity of the note, but it is not shown that at that time the company would not have valuable rights under the contract which it could have assigned if necessary for money to meet the note. No agreement it shown whereby the maker was excused from paying the note.

In *Re Smith,* 106 Fed. 65 a partner who endorsed the note of his firm and afterwards did an act equivalent to waiving presentment, both as maker and endorser, the firm being insolvent and he unable to meet the note was held to come within section 115 of the Massachusetts Negotiable Instruments Act which provided that "where the endorser is the person to whom the instrument is presented for payment" notice of the dishonor of the note need not be given to him.

PRINCIPAL AND SURETY.

Surety Companies

The town of Laurinburg entered into a contract for the construction of a sewer system, the contractor giving a bond, with the defendant company as surety, conditioned for the performance of the contract. The contractor abandoned the work and the town brings suit against the surety company on the bond. The defence is, *inter alia,* that material changes were made in the location and character of the work, thereby discharging the surety.

Held, the surety was not discharged, for the contract, fairly construed, authorized reasonable changes. *"But if this were not so,* it is undisputed that the changes made were all in favor of the contractor. Fully recognizing the rule of *strictissimi juris* as applying to contracts growing out of the ordinary relation of creditor and simple surety we cannot, and do not, recognize this rule as applying to contracts" of a bonding company insuring the performance of contracts as a business and for profit. *Atlantic Trust and Deposit Co.* v. *Town of Laurinburg,* 163 Fed. 690.

PRINCIPAL AND SURETY (Continued).

We have here an interesting example of the way in which the law, by judicial legislation, may grow to meet new economic conditions. It seems not improbable that the dictum of Judge Dayton in this case may be an opening wedge that will at last split off from the general law of suretyship a special law of surety companies. In sole support of its contention the Court cites the case of *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, 1903, where the Supreme Court said that the rule of *strictissimi juris* "ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation, which has undertaken for a profit to insure the obligee against the failure of performance on the part of the principal obligor." Such words though *obiter dicta* show a strong feeling that the law as it exists to-day is too lenient toward the surety where such is a guaranty company. There is doubtless ground for such feeling, and it seems likely that the distinction here contended for will eventually be embodied in our law.

PUBLIC SERVICE CORPORATIONS.

Gas Company: Penalties Against Consumers

By an agreement made November 12, 1897, in pursuance of an ordinance of councils approved on the same date, the City of Philadelphia leased to the United Gas Improvement Company for the term beginning Nov. 12, 1897 and ending Dec. 31, 1927 the Philadelphia Gas Works. The Gas Company is by law obliged to furnish gas to all persons residing in the city of Philadelphia occupying premises therein who apply therefor and comply with the Gas Company's rules and regulations. It furnishes gas on credit to large numbers of persons of small means, against whom it is impossible to collect the amounts due by process of law.

Prior to the lease to the defendant gas company the gas works had been under the control of trustees for the city who adopted, as authorized by Ordinance of February 8, 1838, the following regulations: (1) that in default of payment for gas consumed within ten days after bill is rendered the flow of gas may be stopped until the bill is paid; (2) that a penalty of three per cent. will be added on all bills for gas not paid at their office within five days after presentation.

Clause 11 of defendants' lease authorizes it, its successors and assigns, to enforce the same penalties for non-payment of

PUBLIC SERVICE CORPORATIONS (Continued).

bills at their offices within five days after presentation as are now in force in the city of Philadelphia, and to enforce the same remedies against consumers for breaches of their contracts for the supply of gas. The defendant has enforced aforesaid penalties, but is found by the Court never to have stopped the flow of gas for non-payment of a penalty (p. 118).

Complainants filed applications with the defendant whereby each complainant agreed to pay for the gas consumed promptly and according to the rules of the defendant. Defendant furnished gas to complainants. They neglected to pay within five days after the presentation of the bill by the defendant for gas consumed by them, and were obliged to pay the three per cent. penalty. They filed this bill in equity praying, *inter alia,* for an injunction restraining the defendant from adding the three per cent. or any other penalty to bills not paid at the contract time, from shutting off the gas in case of a refusal to pay such additional sums and for a return of those previously collected.

The Pennsylvania Superior Court in an opinion by Head, J., affirmed a decree dismissing the bill and held that the city of Philadelphia in undertaking to furnish citizens with gas prior to the lease to defendant was acting as a private coporation; that in such capacity it could lawfully enter into contracts with consumers in which it expressly reserves the right to stop the supply in case of a breach of the contract by the consumers' neglect or refusal to pay the stipulated rates at the time and place agreed upon; that the lease contains nothing prohibiting the lessee from enforcing its corporate right to adopt and enforce the regulations to secure payment of bills, already quoted, and which had so long been in force and they were accordingly adopted; that the regulation now attacked has not been declared to be unreasonable nor has it been regarded by the courts as a penalty for the non-payment of a sum of money at a stipulated time, but is a payment by the consumer, who is in default, because he does not wish the defendant to exercise its conceded right to shut off the gas and thus terminate the relation between them. *Bowers* v. *United Gas Improvement Company,* 37 Pa. Superior Court 113 (1908).

In supplying gas or water to its citizens the city acts as a private corporation and has the right to make and enforce reasonable regulations to insure prompt payment. *Commonwealth* v. *Phila.,* 132 Pa. 288 (1890); *Brumm's Appeal,* 22 W. N. C. 137 (Pa. Sup. Ct., 1888).

In the following case the Court refused to restrain the city

PUBLIC SERVICE CORPORATIONS (Continued).

of Philadelphia from cutting off the plaintiff's water supply because they refused to pay three years' arrearages of water rent which had accumulated previously during the ownership of other parties, together with a penalty of fifteen per centum for non-payment according to Ordinance of July 12, 1862 (*Girard Ins. Co.* v. *Phila.*, 88 Pa. 393, 1879); followed in case of practically similar regulation as to payment for gas (*Com.* v. *Phila., supra*). But compare *Turner* v. *Revere Water Co.*, 171 Mass. 329 (1898), where a water company was enjoined from cutting off water for non-payment of water rent arrearages which accrued during previous occupancy of other parties, such regulation being held unreasonable and void.

Defendant printed a copy of said rules and regulations upon the back of every bill rendered by the defendant to consumers of gas. This is a sufficient notice of said regulations. *Miller* v. *Wilkesbarre Gas Co.*, 206 Pa. 254 (1903).

TAXATION.

False Tax Returns

For a considerable time the appellee had made to the tax assessors false returns of his personal property. These they accepted as true and collected taxes upon them yearly. On discovering the fraud, the assessors made a re-assessment of Schmuck's personal property for each of the past twenty-three years, and tried to collect from him taxes on an aggregate re-assessment of twelve million dollars. The Supreme Court denied the recovery. *Schmuck* v. *Hartman, 222* Pa. 190. The obligation to pay taxes is purely statutory, and the means of obtaining them from taxables must therefore be purely statutory. When a taxable makes a false return, the Commonwealth or County has but one remedy provided by statute,—a new valuation by the Board of Revision of Taxes [Sections 10, 11, Act of 1889, P. L. 425]. But since taxes are assessed and paid yearly, the remedy upon one valuation must be lost by using it as a basis for payment. In *Williamson's Estate,* 153 Pa. 508, the circumstances were somewhat similar. There the testator refused to give any returns, and for years was taxed upon the assessor's mistakenly low valuation of his personal property plus the statutory penalty of fifty per cent. [Act of 1885, P. L. 196, sec. 9]. When the city found that the assessments for the past year had been far too low, it was held that they had discovered their mistake too late. No remedy was provided by statute against a taxable who refused to

TAXATION (Continued).

make return, except the remedy which had been adopted. From these two cases it seems that a false return, or failure to make any return, may operate in the taxable's favor, if he can carry them over until taxes have been paid either on his false return or on the mistaken return of the assessors. The Court, in the later case, intimates that the legislature should devise a means of ending this species of fraud.

TORTS.

Courts of Different States: Penal Statutes

Plaintiff's intestate had been killed in a railway accident in Alabama. The defendant railway company was sued in the Georgia courts, under an Alabama statute, which enabled the personal representative of a person killed through the negligence, etc., of a person or corporation to recover punitive damages for such wrongful act. Finding to its satisfaction that the statute in question was neither penal in character, nor subversive of public policy, the Supreme Court of Georgia recognized it, and awarded damages to the plaintiff. (*Southern Ry. Co.* v. *Decker,* 62 S. E. Rep. 679.)

With the Court's statement of the principles of law on the subject, no quarrel can be made. It is supported by text-books and a long line of decisions. Minor, Conflict of Laws, pp. 9, 10, 194; *Huntingdon* v. *Attrill,* 146 U. S. 657. But with the application of these principles to the facts in hand the same satisfaction cannot be expressed. The statute under which the cause of action arose reads in part as follows:

"A personal representative may maintain an action, and recover such damages as the jury may assess, for the wrongful act, omission or negligence of any person or persons, or corporation, his or their agent or servants, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, etc., if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution or conviction or acquittal of the defendant for such wrongful act, etc., and the damages recovered are not subject to the payment of debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions."

It is difficult to see on the face of the matter why this statute

TORTS (Continued).

is not of such penal character as to prevent its judicial recognition. The intention of the Alabama legislature in passing the act, which ought to be conclusive in the matter of interpretation, was, as the Court itself says, to prevent homicide,—not to aid the needy.

A statute giving a right of recovery is often penal as to one party, and remedial as to the other; and the true test would seem in such case to be whether the main purpose of the statute is the giving of compensation for injury sustained, or the infliction of punishment on the wrongdoer. In the case in hand it is to be noted that the foundation for the act is "loss of life by reason of the defendant's negligence." The statute gives a right of action to the personal representative of the deceased for the benefit of his widow, children, or heirs; and if a right of recovery is established, the damages are to be assessed *with reference to the degree of the defendant's culpability.* It appears then, that whatever the damages may be, or whomsoever the person for whose benefit they are recovered, they are not given with reference to the damage sustained.

And the wealth or habits of the deceased may have been such as to preclude the existence of any pecuniary interest in the continuance of his life. All these matters which enter into the question of compensation are excluded from the inquiry. The wrongdoer is punished whether the person recovering has sustained a substantial injury or not. If the beneficiary has in fact sustained a substantial injury, it is in no way made the basis of the recovery. There is no ascertainment of the loss suffered; the amount of the verdict is to be determined by the culpability of the defendant's act, regardless of the injury resulting from it to the persons for whose benefit the suit is brought. It is difficult to say that an assessment which is made to depend solely on the degree of the party's culpability is not meted out primarily as a punishment. The sum is to be determined by the very considerations that would govern a court in fixing a fine for involuntary manslaughter. The fact that it is given to persons whom the law would have entitled to share in the estate of the deceased cannot control the construction. A statute may be penal, though the entire amount recovered is given directly to the party injured.

The Court seems to have had some difficulty in sustaining its interpretation with authorities. Every state has of course the privilege of its own versions of the statutes of sister states (*Huntingdon* v. *Attrill,* 146 U. S. 657; *Evey* v. *Mexican Central R. Co.,* 81 Fed. 294); but it appears peculiar that the Court

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here should pass lightly over the twenty-odd decisions in Alabama holding that this is a penal statute, and fall somewhat lamely back on an interpretation of it by the Supreme Court of Tennessee. And it is to be remembered, also, that acts with provisions practically identical with those in the case at hand, have been held to be penal. *Adams* v. *R. R.*, 67 Vt. 76 (1894); *O'Reilly* v. *N. Y. & N. E. R. R.*, 16 R. I. 388 (1889); *Richardson* v. *N. Y. C. R. R.*, 98 Mass. 85 (1867); *Marshall* v. *Wabash R. R.*, 46 Fed. 269 (1891).

It is to be admitted on the other hand, however, that there has been among the Courts in recent years a growing tendency toward liberality in such cases; and as the Court remarked, statutes which at one time were regarded as strictly penal, are now everywhere enforceable. The case is therefore of great interest, apart from its exhaustive review of the law on the subject, as an indicium of the latest and broadest views on inter-state jurisdiction.

Liability of Charitable Corporation for the Torts of its Servants

Action against a charitable hospital corporation for damages for injuries to plaintiff by being run into in the street by an ambulance of defendant, through the negligence of the driver. *Held*, there is no ground for the exemption of charitable corporations from liability for the torts of their servants to outsiders. *Kellogg* v. *Church Charity Foundation*, 112 N. Y. Supp. 566.

In this case the Court in a very learned opinion has minutely examined the rule absolving charitable corporations from liability for the torts of their servants, and has come to the conclusion that it is not applicable.

After pointing out the fact that the case is one to which, ordinarily, the rule *respondeat superior* would apply, the Court goes on to show that all the reasons usually given for not applying that rule to a charitable corporation are either unsound or inapplicable to the present facts. The reasons usually given are that *respondeat superior* does not apply to a charitable corporation: (*a*) Because it derives no profit or benefit from the business in which it is engaged, *Mulchey* v. *Society*, 125 Mass. 487. This is not a sound reason, inasmuch as many institutions that receive no profit or benefit are nevertheless liable. (*b*) Because payment of damages would be a diversion of the trust funds, which would be enjoined by equity, and such a judgment would therefore be nugatory. *Powers* v. *Hospital*, 109 Fed. 294. This cannot be sound as it does not apply in cases where the

TORTS (Continued).

tort has been the violation of some absolute, non-delegable duty, in which case even a charity is held liable. Also, damages for the non-negligent tort of an express trustee, although recoverable against him only individually, will be paid out of the trust fund if there was no wilful misconduct. *Shepard* v. *Creamer,* 160 Mass. 496. (*c*) Because the beneficiaries of a charitable corporation, by receiving its services, impliedly waive any right of action for injuries due to negligence of the employees. *Hearns* v. *Hospital,* 66 Conn. 123. This rule is sound but would not apply to a case like the principal one where the plaintiff is an outsider. The Court therefore applies the rule, *respondeat superior* and holds defendant liable. Accord: *Bruce* v. *Cent. M. E. Church,* 147 Mich. 230.

TRADE MARKS.

Covenants Running with Personal Property

A sold drinks in bottles, in which was blown his name. B obtained some of the bottles (which also had on them the legend, "This bottle never sold"), and sold another drink in them. A brought a bill to restrain, and obtained an injunction. *Correro* v. *Wright,* 47 Southern 379.

For a further discussion, see Note, p. 251 of this issue.

"Ruberoid" a Descriptive Name

The complainant in 1891 commenced to manufacture a roofing material of felt saturated with a gum composed of the residuum of animal fats. The gum closely resembled rubber, and the roofing material was designated by the complainant as "Ruberoid." In 1901 the complainant registered this name as a trade mark, and now seeks to restrain the alleged infringement thereof by the defndant's use of name "Rubber O" as applied to a similar roofing material.

Held, that "Ruberoid" as applied to the complainant's roofing material is not a valid trade mark as it is merely a misspelling of rubberoid, which is a common descriptive term signifying a resemblance to rubber, and the use of which belongs to the public. *Trinidad Asphalt Mfg. Co.* v. *Standard Paint Co.,* 163 Fed. 977 (1908).

This is an instructive case on an increasingly important branch of the law, and clearly illustrates two fundamental principles as to the validity of trade marks: (1) that "there can be no technical trade mark right in words used to denote

TRADE MARKS (Continued).

class, grade, style, quality, ingredients or characteristics" of the article in question; and (2) that a descriptive word invalid as a trade mark cannot be made a valid trade mark merely by misspelling it.

In accordance with the first of these principles which is supported by a long line of decisions holding that such words as "Medicated Mexican Balm" applied to hair grease [*Perry* v. *Truefitt,* 6 Beav. 66 (1842)] and "Iron Bitters" applied to medicine [*Brown Chemical Co.* v. *Myers,* 139 U. S. 540 (1890)] are not valid trade marks, the Court decided that the word "rubberoid" signified a resemblance to rubber and could not therefore, be adopted as a trade mark. The difficulty in trade mark cases is usually not as to the law but as to the facts, and in this connection it is interesting to note that the English Court of Appeals recently has protected the word "Tabloid" as a trade mark on the ground that at the time of its adoption by complainant it was not a word descriptive of the article to which it was applied. *Welcome* v. *Thompson and Capper* L. R. (1904) 1 Ch. Div. 736. The similarity of this case with the case in question is striking and yet different conclusions were reached.

Under the second principle it has been held that such words as "Kid Nee Kure" applied to a medicine [*Ex parte Henderson,* 85 Off. Gaz. 453], and "Roachsault" applied to roach poison [*Barrett Chemical Co.* v. *Stern,* 176 N. Y. 27], being merely misspellings of descriptive words are not valid trade marks, and, in accordance therewith the Court held that in this case "nothing could be gained by the mere dropping of a 'b' from the appropriate word expressive of the advertised qualities of complainant's product."

TRUSTS.

Promissory Note from Husband to Wife

Plaintiff brought an action to recover on a promissory note made to her by her husband, as evidence of his having received certain money of hers from her father's estate. The note was not to bear interest until twelve months after his death. *Held,* the writing does not purport to create a trust either directly or inferentially. On the contrary it purports to create the relation of debtor and creditor, and is barred by the statute of limitations. *Rice* v. *Crozier,* 117 N. W. 984.

Though the agreement to pay interest is almost conclusive evidence against the existence of a trust (*National Bank* v.

TRUSTS (Continued).

McMurray, 98 Pa. 538) yet the converse is of course not true, and the mere fact that interest was not to be paid, is no evidence of a trust. Furthermore, it is well settled that where the one to whom money is entrusted has the right to mingle the fund with his own money and is liable only to pay back an equivalent sum, he does not become a trustee, but a mere debtor (*Shoemaker* v. *Hinze,* 53 Wis. 116) although it is for the defendant to show affirmatively that he had this right to mix the money with his own (*Wallace* v. *Castle,* 14 Hun. 106). Nothing in the case indicates that the money was set apart by the defendant as in *Hamer* v. *Sidway,* 124 N. Y. 538, nor does it appear that it was "applied" for any purpose, as required in *Massey's Case,* 39 L. J. Ch. 635. The Court was therefore clearly justified in its decision, from whatever standpoint the case may be viewed.

WATERS AND WATER COURSES.

The Supreme Court of Nebraska recently decided a very interesting case involving the limitations of the right to discharge one's surface-waters on the land of another. The facts, which were somewhat unusual were briefly as follows: X and Y were adjoining landowners. A portion of X's land was occupied by a large depression covering some fifty acres, which drained the surface water from the surrounding four hundred acres. During part of the year this depression was entirely inundated, and was at all times unfit for cultivation. Only a few yards away from this lagoon there was a natural draw or canyon beginning in Y's land, running through X's land to the river, and forming the natural outlet for surface waters in the vicinity. Y connected a pond and draw by an artificial ditch, thereby draining his land, but rendering the bed of the draw in X's land unfit for cultivation. X in the suit charged no negligence, but contended that it was an actionable wrong to collect in the artificial drain the waters draining naturally into the basin on Y's premises and discharge them through the draw on X's land. The Court held that Y was within his rights, and dismissed the suit. *Arthur* v. *Glover,* 118 N. W. 111.

Drainage of Surface Waters

At first blush this decision seems contrary to the well-established rule that a land owner has no right to collect surface water in an artificial channel and discharge it upon an adjoining proprietor (Gould, Water, *P.* 271); and contrary also to the earlier Nebraska case of *Davis* v. *Londgren,* 8 Neb. 43,

WATERS AND WATER COURSES (Continued).

which enjoined the draining of just such a pond. Each of these difficulties is on the surface, however. In *Davis* v. *Londgren* the Court, while using rather broad language, decided merely that surface water on the upper estate could not be collected in an artificial channel, and thrown on the land below, there to remain, or to cut a channel for itself to some lower level; the right to use a natural surface waterway, and increase its flowage by the drainage through artificial channels of ponds or lagoons of a temporary character, did not enter into the consideration of the case. In the present case Y did not, strictly speaking, accumulate surface water and cast it on the lands of his neighbor; what he did was to drain the basin by an artificial channel into a draw or natural waterway passing over his land, where the water flowed according to the natural course of drainage over the lands of the lower proprietor, thereby increasing the flow of surface drainage on 400 acres of land.

Now the rule at common law is well settled that a landowner may discharge surface water by means of artificial channels into a river, thereby accelerating its flow, (*McCormick* v. *Horan,* 81 N. Y. 86; Gould on Water, page 275), even though it adds to the burden of his neighbor below. The run in the present case, while not a water-course in the technical sense of the term, was unmistakably a natural waterway or channel, in which surface water collected and flowed to its mouth, and affording an outlet for all the water naturally draining therein from the surrounding country into the river a short distance away. It was one degree removed from natural water courses in their technical signification. If the basin on Y's land had been filled up, the natural drainage would be toward and into the draw, and thus through X's land. It would seem then, under the facts and circumstances as narrated, to be no infringement of X's rights, that Y by adhering to the natural course of drainage, had increased the surface water draining into the draw to the extent necessary to drain 400 acres, which otherwise would flow into the basin on Y's land, and there remain.

The Court founds its decision principally upon *Todd* v. *Co.,* 72 Neb. 207, and *Aldritt* v. *Fleischauer,* 74 Neb. 66, two cases which have been cited with approval in Farnham on Waters (Vol. III, page 887), while the other decisions cited, though not entirely in point, bear out the general doctrine. The case is one of vital interest in the Prairie States, in which these natural draws form almost the entire means of drainage, so that any decision inhibiting such use of them would be undoubtedly prejudicial to the general interests.